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IN THE

Supreme Court of the United States

October Term, 1968

No. 914

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE BALTIMORE & OHIO RAILROAD COMPANY; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellants,

against

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Respondents,

and

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Intervenors-Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION ON BEHALF OF RESPONDENT LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Respondent

RUTH KESSLER TOCH
Solicitor General

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Louis J. Lefkowitz, Attorney General of the State of New York, a respondent in the above entitled matter, moves to dismiss the appeal herein on the ground that the appeal presents no substantial federal question and, in the alternative, moves to affirm the order appealed from on the ground that the question raised in the appeal was correctly decided by the Court below and is so unsubstantial as not to need further argument.

Statement

The action was brought by the *ten* major railroads operating in New York seeking a judgment declaring invalid on constitutional grounds the New York full crew laws then in effect (*Railroad Law*, § § 54-a, 54-b and 54-c) and enjoining their enforcement. In the trial at Special Term there was a comprehensive factual examination into the reasonableness of the effect of the full crew laws on the operation of plaintiffs' railroads under modern technological conditions and operational procedures. The Trial Court in a scholarly opinion (A-1—A-55)* directed the complaint be dismissed; judgment was entered accordingly.

Pending plaintiffs' appeal to the Appellate Division, the Legislature, in 1966 repealed sections 54-a and 54-c of the New York Railroad Law; this was approved by the Governor. The Legislature refused to repeal section 54-b notwithstanding the suggestion of the Public Service Commission in 1960 on proof similar to that adduced by the appellants at the trial of this action (3787a) to repeal the New York full crew statutes in their entirety (A-7—A-9; A-59). The Appellate Division concerned only with the validity of section 54-b affirmed the findings of the Special Term but, modifying on a procedural point, explicitly declared section 54-b constitutional, otherwise affirmed on the opinion at Special Term (A-56; A-59).

The New York Court of Appeals affirmed the findings and determinations of the lower courts (A-58—A-77).

Section 54-b, enacted in 1936, provides that every diesel engine ("fuel-electric engine") must be "manned with a

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* Page references to Appellants' Appendix to Jurisdictional Statement. Page references to the printed Record are followed by letter "a."

crew'' of not less than ''one engineer and one fireman or helper.''

Appellants admit to be valid the general thrust of the statute mandating the presence of two men in the cab of the diesel engine. They acknowledge that the engineer should not be alone in the cab and concede that there ought to be an additional man there as a helper. However, they take issue with the interpretation ''that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications ordinarily possessed by firemen, which make it possible for him to be of assistance to the engineer in the operation of the locomotive'' (A-70), and they charge that section 54-b as interpreted by the New York Court of Appeals is unconstitutional class legislation.

ARGUMENT

The appeal does not raise a substantial federal question.

The question presently before this Court was decided in the recent Arkansas decision approximately three months ago. This Court should not be subjected to hear a similar argument.

Railroading is a hazardous occupation. Safety measures (full crew statutes) affecting railroad operations have again been sustained by this Court as a proper exercise of the police power of the States (*B. L. F. & E.* v. *Chicago, R. I. & P. R. R. Co.*, ____ U. S. ____, 89 S. Ct. 323, 37 U. S. L. W. 4032 [Nov. 18, 1968]).

The railroads summarize their argument at pages 6 and 7 of their Jurisdictional Statement:

"While so-called full crew laws have been before this Court many times, this case presents for the first time the question of whether a state can in the exercise of its police power constitutionally require a fireman to the exclusion of all other operating personnel as a 'helper' to an engineer on a diesel locomotive. The New York Court of Appeals held that it could."

* * *

"This case does not concern itself with the issues posed by the full crew cases—whether it is constitutional to require a certain minimum number of men in a railroad crew."

* * *

And appellants underpin their position:

"Both the majority and dissenting opinions of the [New York] Court of Appeals were in agreement on the issue before that court and now posed in this Court. The dissenting opinion stated the issue as follows (A-74):

"'The evidence amply supports, and the railroads do not contend otherwise, that the presence of an assistant to the engineer however termed or titled, in the engine cab is justified at all times.* * * That is not the issue. The issue is whether safety requires that such an assistant be assigned to the engine crew, separate from the train crew. The argument that brakemen on the train crew do not or will not have the training or skills required to assist the engineer is blasted by the practice of the railroads in those states that permit it, and in neighboring Canada, to have some train brakemen so trained, and indeed, to be in the line of promotion to diesel engineers. Hence it is a false issue to argue that the engineer's assistant must have special training.'"

There should be added the balance of the paragraph of the dissenting opinion (A-74-75):

"The answer is a concession that he must, although not necessarily the full training of an engineer, but

that such training may be obtained and required of ~~one~~ or more members of the train crew."

The question at hand pervaded the recent Arkansas full crew case and in their reply brief in the New York Court of Appeals in the instant case—prior to this Court's decision in the Arkansas case—the railroads argued (p. 13):

> "One of the requirements of the Arkansas minimum crew law, however, was a 'fireman' on all freight and yard locomotives, and the issue in the *Hardin* case with respect to this 'fireman' requirement is the same as it is here. In *Hardin* the BLF & E argued, just as it did here prior to repeal of §§ 54-a and 54-c requiring a five man minimum crew in all freight and yard operations, that the requirement of a 'fireman' as a member of a six man minimum crew meant that a member of the BLF & E had to be retained irrespective of how many other crew members were available to help the engineer."

This Court in the Arkansas case reviewed some factual findings of Arbitration Board No. 282 demonstrating the technical proficiency of firemen necessary to insure safe and adequate transportation, and concluded that "the question of safety . . . is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives."

The training and qualifications of the fireman are summarized in the opinion of the trial court (A-23-28) in the instant case The fireman possesses not only the ability to take and pass signals and act as a lookout—a talent common to all train employees—but also the training and qualifications, in all types of service, capable of the production and maintenance of power and relief to the engineer in case of his fatigue or in case of emergency. Trainmen (conductors and brakemen) do not possess these latter

attributes. The railroads' chief witness, a New York Central vice-president for transportation admitted (325-26a):

> "Q. Mr. Kenefick, it is a fact, is it not, that the brakemen or let us say those in train service do not take any training whatever in the operation or mechanical functions of a Diesel engine? A. That's right.
> "Q. It is solely the fireman who gets that training? A. I know it is not the trainman."

The trial court so found.

Additionally, the fireman is on the engineers' promotion list; he is trained and must qualify to act as an engineer within a specified period after being hired, and eventually he becomes an engineer. On the other hand, brakemen are trained in the functions of the train crew and eventually become conductors (263-4a).

This distinction has always been recognized by the railroads. Quite apart from the New York law and the full crew statutes of other states, the fireman has always been designated as the second man in the Diesel cab (A-9).

In this light upon the mass of evidence presented, the New York Court of Appeals was called upon to construe what the Legislature intended in 1936 by the expression "and one fireman or helper" as used in § 54-b. Its interpretation is challenged as unconstitutional class legislation. The railroads claim that they are under an unconstitutional compulsion by reason of the decision to provide employment to the members of a labor union solely on the basis of their being labelled "fireman." In essence, the railroads are saying that the Brotherhood of Locomotive Firemen and Enginemen is permitted "to run the show" with judicial approval.

Neither the New York Court of Appeals nor the lower courts of the State made any such determination. Con-

fronted with the problem of the construction of the phrase "and one fireman or helper" they correctly reasoned on the evidence that the individual, however termed or titled, must in the interest of safety, possess not only the ability to take and pass signals and to act as a lookout, but the supplementary training and qualifications in all types of service capable of the production and maintenance of power and relief to the engineer in case of emergency or the engineer's fatigue, and that such an individual must be assigned to the engine crew at all times as the statute directs. That is all the New York courts have said; no more; no less.

Distilled to its very essence the issue presented to the New York courts, and now before this Court, is simply stated: Who shall be of assistance to the engineer (a) the inexperienced and untrained employee or (b) or the man qualified and trained in the mechanical functions and operation of the diesel locomotive? In the interest of safety, common sense dictates the choice of the experienced man. Courts are at liberty to construe statutes in such a way as to make them conform to reason, justice and common sense. A statute is intended not only for the period in which it is adopted, but for the future also, and it should, in such cases, be interpreted according to the view which reasonable men would take of it in the light of existing circumstances. And that is exactly the manner in which the New York Court of Appeals resolved the question. Any other construction would produce an absurdity which the courts avoid whenever a more rational interpretation consonant with the primary purpose of a statute may be supported.

At pages 12 and 13 of their Jurisdictional Statement the railroads lament their management problems. Unfortunately for them that difficulty is not the subject of this

litigation. It may be resolved by other means. And much is said by the railroads about the New York courts expunging the word "helper" from section 54-b. Appellants have misconstrued the decisions. All that the courts have insisted on in the interests of safety is training and competence. For more than 30 years the railroads have been free to train and qualify capable assistants to the engineer, and during that entire period they have only qualified the "fireman". Their failure does not justify the slurs on the Legislature or the Judiciary (on page 17 of their Statement):

> "The lower courts seized upon the success of the BLF & E on some of the Railroads in requiring that firemen be trained as engineers and eventually qualify as such, and in some vague, unexplained way intimated that these requirements justify excision of the term 'helper' from the statute. These requirements, however, are nowhere embodied in the statute, and the necessary consequence of the lower courts' construction has been to delegate to the BLF & E the power to determine in its sole and nonreviewable discretion the standards and qualifications for 'helpers.'
>
> "The lower courts also held by necessary implication that the qualifications for 'helpers' can constitutionally vary from railroad to railroad because, as revealed above, the qualifications do in fact vary depending upon the bargaining strength of the particular local BLF & E lodge involved. But the Legislature cannot delegate its power to the BLF & E and it was error for the Court of Appeals to confer upon the BLF & E the exclusive franchise to determine who shall and who shall not be the second man on the locomotive."

We have searched the record in vain for the slightest justification for this.

The instant action was obviously not brought to settle discord between management and labor. Rather, by plead-

ing and proofs, the railroads challenged a safety statute —a matter of deep concern to the people of the State of New York (*BLF & E* v. *Chicago, R. I. & P. Co., supra*). The claim of abdication and delegation of legislative authority with judicial sanction is frivolous since it is fundamental that a delegation of a legislature's authority will never be implied. Courts, therefore, will not unnecessarily hold that the Legislature intended to delegate powers in the absence clear, definite language, unambiguously conferring such jurisdiction; and bad faith may not be imputed to the lawmakers.

In the interest of safety, the need for the second man in the locomotive cab to have the training and qualifications of the "fireman" type employee was fully recognized by this Court in *BLF & E* v. *Chicago, R. I. & P. R. Co., supra.* It follows rationally that any alternate or substitute for that position must of necessity possess the equivalent characteristics, qualities and fitness, no more, no less. Neither this Court nor the New York courts have suggested or insisted that the second man in the cab be an engineer or be specifically chosen to be trained as an engineer. Thus, no substantial federal issue is presented.

The construction of section 54-b—the New York statute —by the New York Court of Appeals is binding on this Court (*Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 423).

Appellants' reliance on cases which they cite is misplaced. The cases are distinguishable out of hand:

Smith v. *Texas,* 233 U. S. 630:

There, the statute required all conductors on freight trains to have two years experience as brakemen.

Here, the statute contains no such requisite. Section 54-b offers an open invitation to train any men as "helper" to capably and competently assist the engineer.

Atchison, Topeka & Santa Fe Ry. Co. v. *State,* 33 Ariz. 440, 265 Pac. 602 (1928):

There, the statute required anyone who received or transmitted train orders by telephone, including train crew members, to have at least one year's experience as a telegraph operator. It does seem ridiculous to require training in the Morse code when one is carrying on an oral conversation.

Here, the statute makes no similar comparable demand. We repeat, the section leaves the field wide open.

Missouri-Kansas-Texas Railroad Co. v. *State,* 131 S. W. 2d 702 (Tex. Civ. App. 1939), writ of error refused (Tex. Sup. Ct. 1939):

This case involved the duties of brakemen as such and was not concerned with the operation and functions of the locomotive. Therefore it is not pertinent.

New York Public Service Commission Case No. 24598 (1968):

The construction of a statute is for the Courts, whose jurisdiction cannot be ousted by administrative or executive authority. The decision by the New York Public Service Commission is thus not controlling. And perhaps the Commission's decision in *BLF & E* v. *Erie Lackawanna R. Co.,* Case No. 23327 (1965) was more convincing to the New York Court of Appeals on the legislative intent. In that case the Commission stated:

"It is well understood that, in the absence of anything to indicate a contrary legislative intent, technical or special words in a statute are to receive technical or special meanings. See 1 McKinney Laws § 233; *People* v. *Wainwright*, 237 N. Y. 407, 412; *People* v. *Lane*, 132 App. Div. 406, 407-408, affirmed 196 N. Y. 520. There can be little doubt that the word 'fireman' in this statute is not being used in the well known popular or ordinary sense of a man engaged in fighting fires. It is perfectly clear from the context of the statute that the technical or special meaning common in the railroad industry is intended. In like fashion, the word 'helper' in this statute is not being used in a popular or ordinary sense but, rather, is intended to carry technical or special meaning common in the railroad industry. The evidence in this record establishes that prior to, at the time of, and since the passage of this statute, the word 'helper' in the railroad industry has had meanings depending on the context of its use. When associated with a ground crew, 'helper' has meant a brakeman or similar type of employee; in connection with an engine crew, it has meant a man who replaces the fireman on an other-than steam locomotive. . . ."

The question presently before this Court was decided in the recent Arkansas decision approximately three months ago. This Court should not be subjected to hear a similar argument.

Conclusion

The appeal herein should be dismissed for lack of a substantial federal question, or in the alternative, the order appealed from should be affirmed, on the ground that the questions raised in the appeal were correctly decided by the Court below and are so unsubstantial as not to need further argument.

Dated: January 27, 1969.

Respectfully submitted,

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